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No. 76-235

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**In the Supreme Court of the United States**

OCTOBER TERM, 1976

**E. ALVEY WRIGHT, DIRECTOR OF THE HAWAII DEPARTMENT  
OF TRANSPORTATION, PETITIONER**

v.

**STOP H-3 ASSOCIATION, A HAWAIIAN NON-PROFIT  
CORPORATION, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

**ROBERT H. BORK,  
Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 533 F. 2d 434. The opinion of the district court (Pet. App. 34a-64a) is reported at 389 F. Supp. 1102.

**JURISDICTION**

The judgment of the court of appeals was entered on March 8, 1976. A timely petition for rehearing, with suggestion of rehearing *en banc*, was denied on May 21, 1976 (Pet. App. 32a-33a). The petition for a writ of certiorari was filed on August 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the court of appeals erred in holding that the Secretary of Transportation was required, before approving the expenditure of federal funds in connection with the proposed construction of a segment of interstate highway in Hawaii, to make the determinations specified by Section 4(f) of the Department of Transportation Act of 1966, as amended, and Section 18(a) of the Federal-Aid Highway Act of 1968.

### STATEMENT

The question presented by this case is the applicability of Section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. 1653(f), and Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, to the proposed construction of a segment of interstate highway in Hawaii. Both statutes (referred to hereafter as Section 4(f))<sup>1</sup> require the Secretary of Transportation to withhold federal funding

<sup>1</sup>Section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. 1653(f), which is identical in pertinent part to Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, provides as follows:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or

for any project involving the use of "any land from an historic site of national, State, or local significance \* \* \* unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such \* \* \* historic site resulting from such use." The Secretary of Transportation, after having concluded that the proposed highway would not use any land "from an historic site of national, State, or local significance," approved the project without determining whether a "feasible and prudent alternative" existed or whether "all possible planning" had been undertaken to minimize harm to historic sites. Petitioner here challenges the decision of the court of appeals disapproving the Secretary's actions.

The essential facts are not in dispute. The purpose of the proposed interstate highway, which is known as TH-3, is to connect the leeward side of the Island of Oahu near Honolulu with the windward side of the island near the Kaneohe Marine Corps Air Station.<sup>2</sup> As planned, the highway—ninety percent of the funding for which will be provided by the federal government—will traverse the interior of the island through the narrow Moanalua Valley and come within 100 to 200 feet of a large petroglyph rock known as Pohaku ka Luahine. The Moanalua Valley and the petroglyph rock are both privately owned (Pet. App. 5a-6a).

local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

<sup>2</sup>A map depicting the proposed highway appears in the petition at page 4.



In March 1973, the Moanalua Gardens Foundation, a private non-profit organization, requested the Secretary of the Interior to include the Moanalua Valley in the National Register of Historic Places as a site of national historic significance.<sup>3</sup> The Secretary's advisory board, formed pursuant to 16 U.S.C. 463, thereafter concluded that insufficient evidence had been presented to demonstrate conclusively that the Moanalua Valley was of national historic significance. The board noted, however, that "[h]istorical, cultural, and the natural values combined with outstanding potential for an environmental study area endow Moanalua Valley with an importance that makes its preservation clearly in the public interest" (see Pet. App. 6a). Meanwhile, in July 1973, the Secretary listed the petroglyph rock located in the valley in the National Register after having received a nomination requesting such action from the State of Hawaii (39 Fed. Reg. 6422).

After the petroglyph rock had been listed in the National Register, the Secretary of Transportation requested the Advisory Council on Historic Preservation to comment, pursuant to Section 106 of the National Historic Preservation Act (16 U.S.C. 470f, as amended by Pub. L. 94-422, 90 Stat. 1313, 1320), concerning the highway's potential impact on the rock.<sup>4</sup> As part of its consideration of the matter, the Council requested the Secretary of the Interior to advise it regarding the

<sup>3</sup>The National Register is maintained by the Secretary of the Interior pursuant to the National Historic Preservation Act of 1966, 16 U.S.C. 470a(a)(1), and the Historic Sites Act of 1935, as amended, 16 U.S.C. 461 *et seq.*

<sup>4</sup>The Advisory Council on Historic Preservation is an independent agency of the United States, whose members include the Secretaries of the Interior and Transportation, with responsibility to comment on federal, federally-assisted and federally-licensed undertakings affecting properties included in or eligible for inclusion in the National Register. 90 Stat. 1320.

historic significance of the entire valley. The Secretary thereafter determined that the valley "may be eligible for inclusion in the National Register of Historic Places and [is] therefore entitled to protection under \*\*\* applicable Federal legislation." 39 Fed. Reg. 16175-16176. In a subsequent letter to Governor Burns of Hawaii, the Secretary explained that although the Moanalua Valley was not of national historic significance, the valley possessed "historical and cultural values of at least local dimensions and, therefore, could meet the less stringent criteria of the National Register for sites of local significance" (see Pet. App. 7a).

On August 5, 1974, the Hawaii Historic Places Review Board, the state agency responsible for evaluating and nominating Hawaiian properties for inclusion in the National Register, determined that the Moanalua Valley was only of "marginal" local significance (Pet. App. 7a). The board therefore declined to nominate the valley for inclusion in the National Register. At about the same time, the Council on Historic Preservation advised the Secretary of Transportation that the Moanalua Valley and the petroglyph rock possessed "historic, cultural, and archeological significance warranting their preservation" (see Pet. App. 8a).

On September 19, 1974, the Secretary of Transportation concluded that the Moanalua Valley "does not come under the provisions of Section 4(f)" (see Pet. App. 8a). The Secretary also decided to proceed with federal funding of the interstate highway, with certain measures being taken to protect the petroglyph rock from being adversely affected (see Pet. 15, 25).

The Stop H-3 Association, a private non-profit organization, brought this action alleging, *inter alia*, that Section 4(f) was applicable both to the petroglyph rock and the Moanalua Valley. But because the petroglyph

rock had been moved, and theoretically could be moved again, the district court held that Section 4(f) was not applicable to it, despite its inclusion in the National Register (Pet. App. 59a). The court also held that the determination that the Moanalua Valley "may be eligible" for inclusion in the National Register as an historic site of local significance was insufficient to trigger the procedures specified by Section 4(f)—particularly since the Hawaii Historic Places Review Board already had found that the valley was only of "marginal" local significance (Pet. App. 59a-61a).

The court of appeals reversed (by a vote of 2 to 1). With respect to the petroglyph rock, the court held that the Secretary of Transportation was required to comply with Section 4(f) because the rock, although displaced, was sufficiently related to its "immediate environs" to qualify for protection under Section 4(f) and that the proposed highway would pass sufficiently near the rock to "use" land from that historic site" (Pet. App. 17a-18a). The court also held that the Secretary of Transportation had erred in concluding that Section 4(f) was inapplicable to the Moanalua Valley. The court pointed out that after the district court's decision the Secretary of the Interior had published in the Federal Register a notice that the valley had been determined to be eligible for inclusion in the National Register (40 Fed. Reg. 23906-23907), thereby obviating any need for the court to decide whether the designation "may be eligible" triggered the procedures of Section 4(f). The court further held that the state determination that the valley was of only "marginal" local significance had not precluded the Secretary of the Interior from determining that the valley was in fact of local significance, or from including it in the National Register on that basis (Pet. App. 8a-11a).

## ARGUMENT

Petitioner—the Director of the Hawaii Department of Transportation—argues at length that this case involves delicate and complicated issues of federalism (*e.g.*, Pet. 18). We disagree. This case involves a dispute concerning the significance under Section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. 1653(f), and Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, of a determination by the Secretary of the Interior, on his own motion, that a property is of local historic significance. This case also involves a factual dispute concerning whether the proposed highway will "use" land from an historic site (Pohaku ka Luahine and its immediate environs), thereby requiring the Secretary of Transportation to make the determinations called for by Section 4(f) of the Department of Transportation Act and Section 18(a) of the Federal-Aid Highway Act before approving the expenditure of any federal funds for the project.

Neither of these disputes presents an issue warranting the attention of this Court. The court of appeals' holding that the procedures specified by Section 4(f) are triggered by a determination of the Secretary of the Interior—arrived at without local concurrence—that particular property is of state or local historic significance does not conflict with any decision of this Court or of any other federal court. Neither does the court's holding that the proposed interstate highway will "use" land associated with an historic site (Pohaku ka Luahine and its immediate environs) conflict with the decision of any other court. It is settled that constructive use of an historic site is sufficient to require federal compliance with Section 4(f); the court's holding on this issue thus represents only the application of settled law to "the particular



circumstances of this case" (Pet. App. 18a).<sup>5</sup> Moreover, although the Secretary of the Interior continues to believe that the National Historic Preservation Act of 1966 and the Historic Sites Act of 1935 (see n. 3, *supra*) would empower him to determine, on his own motion, the eligibility of properties for inclusion in the National Register on the basis of their state or local historic significance, under the regulations now governing the National Register of Historic Places Program it is unlikely that this power will be exercised in any significant manner.

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<sup>5</sup>Contrary to petitioner's assertion (Pet. 25), the holding in *ACORN v. Brinegar*, 398 F. Supp. 685 (E.D. Ark.), affirmed, 531 F. 2d 864 (C.A. 8), does not conflict with the court of appeals' holding in this case that the proposed highway would "use" Pohaku ka Luahine and its immediate environs. Although the district court held in *ACORN* that the highway there at issue would not "use" a particular public park, the court acknowledged that evidence of a constructive use of the park would trigger the procedures specified by Section 4(f) of the Department of Transportation Act (398 F. Supp. at 692):

If the park is a public park, it simply cannot be used actually or constructively for federal highway purposes until a proper statutory finding has been made.

<sup>6</sup>The regulations governing the National Register of Historic Places Program specify the manner in which the National Register will be expanded. Those regulations contain no provision for direct listing by the Secretary of the Interior, on his own motion, of areas of state or local historic significance. See 36 C.F.R. 60.2(d). In addition, regulations recently proposed by the Secretary to govern requests for determinations of eligibility for listing—as opposed to actual listing—in the National Register provide that eligibility determinations will be made at the behest of federal agencies needing guidance concerning the impact of proposed projects on properties that may be of historic significance. The proposed regulations do not authorize either state officials or private groups to request determinations of eligibility. Nor do the proposed regulations contain procedures for *sua sponte* determinations of eligibility by the Secretary of the Interior. See 41 Fed. Reg. 17688-17689 (April 27, 1976).

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,  
*Solicitor General.*

OCTOBER 1976.